

UNITED STATES BANKRUPTCY COURT
DISTRICT OF HAWAII

In re)	Case No. 04-01630
)	Chapter 11
ATELIER USA, INC.,)	
)	
Debtor.)	Re: Docket Nos. 87, 115, 169
_____)	

**MEMORANDUM DECISION REGARDING ATTORNEYS' FEES AND
COSTS REQUESTED BY JOHN AND MARY HEWITT**

The issue presented is the reasonable amount of attorneys' fees and costs to be paid by the debtor as additional rent under a lease. I conclude that the debtor must pay to the lessors, John and Mary Hewitt ("Hewitts"), \$65,297.98¹ in attorneys' fees and costs.

Background

The debtor, Atelier USA, Inc., commenced this case by filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code on June

¹ The Hewitts' motion requests \$58,721.10. This total does not include fees and costs of \$6,576.88 for the period August 17, 2004, through August 30, 2004, reflected in the supporting invoices but apparently mistakenly excluded from the total set forth in the motion. In addition, the invoice for August 17, 2004, through August 30, 2004, included \$247.50 plus tax of \$10.30 for services that were previously billed in the July 20, 2004, through August 17, 2004, invoice. Therefore, \$257.80 was subtracted to arrive at a total of \$6,576.88.

24, 2004. The debtor's main asset is a lease of nonresidential real property located at 333 Royal Hawaiian Avenue. John and Mary Hewitt and the Donald Hewitt Trust currently own the land.² The debtor subleases a small portion of the property to American Foreign Exchange and the remainder to Mr. Do Hyun Ji. Mr. Ji allows various vendors to operate retail carts on the property.

As of the date of the petition filing, the debtor owed the Hewitts \$154,011.39³ in pre-petition rent.⁴ The lease required the debtor to pay quarterly rent of \$75,000 by July 1, 2004, of which \$54,687.68 was payable to the Hewitts and the rest was payable to the Donald Hewitt Trust. The debtor did not make the quarterly payment by the July 1, 2004, deadline. The Hewitts claim that the debtor also committed other monetary and non-monetary defaults. The Hewitts filed a motion for relief from the automatic stay to allow them to continue prosecuting their complaint for summary possession filed in state court on May 6, 2004. The Hewitts also filed a motion to compel the debtor to assume or reject the

² The lease covers two subdivided lots. Lot 81 is owned by John and Mary Hewitt as tenants in common with an undivided fifty percent interest each. Lot 82 is owned by John and Mary Hewitt as tenants in common with an undivided one-fourth interest each and the other half interest owned by the Donald Hewitt Trust. The Hewitts have been more active than the Donald Hewitt Trust in enforcing the lease.

³ This is the proportional share of pre-petition rent attributable to the Hewitts' interest in the land.

⁴ See Declaration of John Arthur Hewitt in Support of Motion to Compel Debtor to Assume or Reject Real Property Lease; To Timely Perform All Obligations Under the Lease; and Authorizing the Allowance and Payment of an Administrative Expense Claim for Unpaid Post-Petition Lease Payment.

lease, to timely perform all obligations under the lease, and to pay unpaid post-petition lease rent. The court continued the hearing on both motions several times to allow the debtor time to cure its defaults under the lease. The debtor moved for authority to assume the lease and assign it to Mr. Ji, but the court denied the motion because the assignee did not provide adequate assurance of future performance under the lease. The court further continued the motion for relief from the automatic stay and the motion to compel assumption or rejection of the lease provided that the debtor paid the next quarterly rent installment due on October 1, 2004. The court determined that the Hewitts were entitled to reasonable attorneys' fees and costs as additional rent as provided for under the lease and granted the debtor an opportunity to file a memorandum stating its objection to the amounts requested. The debtor did so and the Hewitts filed a response.

Discussion

A. The Attorneys' Fees Requested Should Be Paid Pursuant to § 365(d)(3) and the Terms of the Lease

Pursuant to 11 U.S.C. § 365(d)(3), "the [debtor in possession] shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected . . ." The plain language of the statute requires the debtor in possession to perform all lease

obligations during the sixty-day period and during any court-authorized extension.

In re Pacific Sea Farms, Inc., 134 B.R. 11, 15 (Bankr. D. Haw. 1991) citing In re

Tandem Group, Inc., 60 B.R. 125, 127 (Bankr. C.D. Cal. 1986). Congress

intended that the lessor not suffer any risk or loss because of the failure of the

debtor or trustee to timely perform its obligations under the Code. “Such loss

would include attorney’s fees necessarily and reasonably incurred by the lessor in

protecting its rights under its lease with the debtor . . . if required to be reimbursed

under the lease agreement.” In re Pacific Sea Farms, Inc., 134 B.R. at 15.

In this case, the language of the lease provision is very broad. The lease provides at paragraph 16:

EXPENSES OF LESSOR. Lessee will pay to Lessor, within ten (10) days after the date of mailing or personal delivery of statements therefor (a) all costs and expenses including reasonable attorneys’ fees paid or incurred by Lessor but required to be paid by Lessee under any covenant herein contained or paid or incurred by Lessor in enforcing any of Lessee’s covenants herein contained, in protecting itself against any breach thereof, in remedying any breach thereof, in collecting or causing to be paid any delinquent rent, taxes or other charges hereunder payable by Lessee, or in connection with any litigation (other than condemnation proceedings) commenced by or against Lessee to which Lessor shall without fault be made a party, and (b) a reasonable fee for reviewing and processing any request by Lessee for Lessor’s consent or approval, which fee shall be a flat-rate service charge as established by the policy of Lessor then in effect or a sum equal to all costs and expenses paid or incurred by Lessor, including without limitation reasonable fees of attorneys and other consultants retained by Lessor and the costs of Lessor’s regular salaried staff in connection therewith, whichever is greater. All such

costs, expenses and fees shall constitute additional rent and shall bear interest as provided in Paragraph 3 hereof.

The specific language in the lease gives the Hewitts the right to recover their reasonable attorneys' fees for a wide variety of actions including: 1) enforcing the covenants of the lease, 2) protecting themselves against any breach of the lease, 3) remedying any breach, 4) recovering possession of the premises, and 5) collecting any delinquent rent, taxes, or other charges. The Hewitts incurred attorneys' fees for the following tasks:

1. Motion for Relief from Stay - The Hewitts sought to exercise their state law rights to obtain possession of the property based on the debtor's pre-petition defaults and pre- and post-petition breaches of the lease, both monetary and non-monetary. The fees for this task are recoverable because the Hewitts were attempting to protect themselves against breaches of the lease, recover possession of the premises, and collect delinquent rent, taxes, or other charges.

2. Motion to Compel - The Hewitts sought a court order requiring the debtor to comply with the terms of the lease including the payment of delinquent post-petition rent, payment of real property taxes, and cure of non-monetary defaults. The fees for this task are recoverable because the Hewitts were attempting to protect themselves against breaches of the lease, recover possession of the premises, and collect delinquent rent, taxes, or other charges.

3. Rule 2004 Examinations - The Hewitts questioned Harry Nakamura, the debtor's designated representative, about breaches of the lease, how the debtor intended to cure such breaches, the debtor's ability to cure and perform the lease, and future compliance with the lease. Mr. Ji was questioned about the debtor's breaches of the lease, amounts Mr. Ji owed to the debtor, and Mr. Ji's performance of his sublease. These examinations assisted the Hewitts in enforcing the covenants of the lease, protecting themselves against breaches of the lease, remedying any breach of the lease, and collecting delinquent rent, taxes, or other charges.

4. Motion to Assume the Lease - The Hewitts opposed this motion based on their concerns that the proposed assignee did not provide adequate assurance of future performance under the lease. The fees for this task are recoverable because the Hewitts were attempting to protect themselves against breaches of the lease and recover possession of the premises.

5. Motion to Extend Time to Assume or Reject the Lease - The Hewitts opposed this motion and sought to expedite the debtor's assumption or rejection of the lease. The Hewitts were trying to protect themselves against breaches of the lease, remedy breaches, recover possession of the premises, and collect delinquent rent, taxes, or other charges.

B. The Attorneys' Fees Requested Are Reasonable

Although 11 U.S.C. § 330(3)(A) is not applicable to the Hewitts' request for attorneys' fees, that section nonetheless provides a useful set of principles for assessing the reasonableness of a fee request. Under that provision, the court determines the amount of reasonable compensation by considering the nature, the extent, and the value of the services rendered, taking into account all relevant factors, including the time spent on the services, the rates charged, whether the services were necessary or beneficial when rendered, whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task, and whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners.

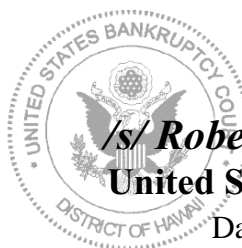
The Hewitts' counsel submitted invoices for services rendered from June 24, 2004, through October 13, 2004. The services performed were reasonable and necessary in view of the debtor's failure to abide by the terms of the lease. The rates charged are comparable to other practitioners within the state and the time spent on various issues was reasonable. Thus, I am satisfied that the attorneys' fees requested are reasonable.

C. The Attorneys' Fees Are Not Capped by Haw. Rev. Stat. § 607-14

Haw. Rev. Stat. § 607-14 provides that in all actions in the nature of assumpsit and all actions on a promissory note or other contract in writing that provides for an attorney's fee, the losing party shall pay attorney's fees in an amount not to exceed twenty-five percent of the judgment. The amount of fees requested does not exceed twenty-five percent of the amount of the "judgment" sought by the Hewitts. The amount of the judgment could include not only \$154,011.39 of pre-petition rent, but also all other damages claimed by the Hewitts, including future rent and real property taxes, and any cost of curing other breaches. The annual rent payments under the lease equal \$300,000. The fees awarded in this order would exceed the twenty-five percent limit only in the inconceivable event that the Hewitts recover a total judgment of less than \$261,191.92.

Conclusion

The attorneys' fees requested by the Hewitts are recoverable under the terms of the lease obligating the debtor to pay the Hewitts' attorneys' fees. In accordance with section 365(d)(3), the Hewitts are awarded \$65,297.98 and the debtor is ordered to pay such sum immediately.



/s/ Robert J. Faris

United States Bankruptcy Judge

Dated: November 24, 2004